STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
V	No. 250169 Oakland Circuit Court
CARLTON VIRGIL BURKS, Defendant-Appellant.	LC No. 2003-188223-FH

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of attempted unlawful driving away of an automobile, MCL 750.92 and MCL 750.413, receiving or concealing stolen property valued at $200 or more but less than $1,000, MCL 750.535(4)(a), and fourth-degree fleeing or eluding a police officer, MCL 750.479a(2). He was sentenced as a fourth-felony habitual offender, MCL 769.12, to concurrent prison terms of eighteen months to fifteen years for the attempted UDAA and fleeing or eluding convictions, and to 109 days in jail for the receiving or concealing stolen property conviction. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The police began pursuing defendant after he was observed driving a suspected stolen vehicle, a 1979 Chevrolet Caprice. Defendant abandoned the Caprice after it was no longer drivable. He ran to an apartment complex where a witness saw him looking into other vehicles. He broke the window of a Neon, entered the vehicle, and turned off the car's alarm. The witness saw defendant fumble around near the Neon's ignition. At the time the siren of an approaching police car could be heard in the area, the witness saw defendant climb into the back seat of the Neon, where he was discovered and arrested shortly thereafter. After his arrest, the police found a screwdriver in the back seat of the Neon. After the Caprice was recovered, the owner could only operate it with a screwdriver because the steering column had been damaged.

Defendant first argues that the evidence was insufficient to convict him of attempted UDAA with respect to the Neon. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on "'whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding [the defendant] guilt[y] beyond a reasonable doubt.'" *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended

441 Mich 1201 (1992), quoting *People v Hampton*, 407 Mich 354, 366 (1979). The evidence must be reviewed in the light most favorable to the prosecution. *Id*. at 515.

Defendant argues that the evidence failed to show an intent to drive the Neon away because there was no evidence that he attempted to start the Neon; he argues that the evidence only shows that he broke into the Neon to hide. The elements of UDAA are "(1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) the possession and driving away must be done without authority or permission." *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). "[A]n 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). The defendant must commit some act that goes beyond mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

The evidence indicated that defendant broke into the Neon and turned off the alarm after he abandoned the Caprice, which was no longer driveable. The witness who observed defendant saw him in the front seat of the Neon, and it appeared that defendant was trying to do something to the car's steering column. The evidence indicated that defendant had earlier operated the Caprice, which had a damaged steering column and was operable only with a screwdriver, and that a screwdriver was found in the Neon when Defendant was arrested. The owner of the Neon denied having a screwdriver in the car. Defendant jumped into the back seat of the Neon only after a police siren could be heard in the area. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant broke into the Neon intending to drive it away. The trial court did not err in denying defendant's motion for a directed verdict.

Defendant also argues that the evidence was insufficient to convict him of receiving or concealing stolen property with respect to the Caprice.

The elements of receiving or concealing stolen property are as follows:

> (1) [T]he property was stolen; (2) the value of the property met the statutory requirement; (3) defendant received, possessed, or concealed the property with knowledge that the property was stolen; (4) the identity of the property as being that previously stolen; and (5) the guilty actual or constructive knowledge of the defendant that the property received or concealed was stolen. [*People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002).]

The only element that defendant challenges is the value of the stolen property. He was convicted of violating MCL 750.535(4)(a), which requires that the stolen property have a value of $200 or more but less than $1,000.

In *Pratt*, *supra* at 428-429, this Court discussed the methodology for proving the value of stolen property:

> Defendant also challenges whether sufficient evidence was admitted regarding the value of the Buick, contending that the prosecution should have been required to have the car appraised. Again, we disagree. With regard to a

general valuation rule, at least in the context of the larceny statute, this Court, in *People v Johnson*, 133 Mich App 150, 153; 348 NW2d 716 (1984), stated:

> "While the larceny statute itself does not provide a guide for determining the value of property which is the subject of a theft, case law supports the use of fair market value as the relevant standard when such a value exists. Generally, proof of value is determined by reference to the time and place of the offense. Value has been interpreted to mean the price that the item will bring on an open market between a willing buyer and seller. [Citations omitted.]"

> An owner of a car is qualified to testify about the value of his property unless his valuation is based on personal or sentimental value. *People v Watts*, 133 Mich App 80, 84; 348 NW2d 39 (1984). The phrase "personal value" means subjective value to the owner, or a value that cannot be objectively substantiated. *People v Dyer*, 157 Mich App 606, 611; 403 NW2d 84 (1986). Here, the former girlfriend's father, who had purchased the car, testified about its value. There was no evidence admitted to suggest that his perception of the Buick's value was based on his personal or sentimental value; therefore, a jury could conclude that the car was valued at more than $1,000. Defendant's assertion that the prosecution should have provided an appraiser's testimony is without merit. Case law is clear that a prosecutor has the discretion to prove his case by whatever admissible evidence he chooses. See, e.g., *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Because the prosecutor is under no obligation to present the evidence defendant feels appropriate, defendant's sufficiency of the evidence claim is without merit.

In this case, the owner of the Caprice testified that he purchased the vehicle for $600 less than a month before it was stolen. The seller had demanded $800, but the owner negotiated the price downward. In his opinion, the car was still worth $600 at the time it was stolen. Pursuant to *Pratt, supra* at 429, the owner's testimony about the value of the Caprice was sufficient to support the jury's verdict because it is apparent that the witness based his testimony on the car's fair market value, as demonstrated by his recent purchase, rather than on the personal or sentimental value of the car.

Defendant next argues that the trial court erred in allowing the jury to hear a tape recording of calls made to and by the police dispatcher.

> The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. However, where, as here, the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). [*People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).]

Over defendant's objection, the trial court allowed the prosecution to play a tape recording of calls placed through the dispatcher during the pursuit of the Caprice. The court determined that the tape recording was admissible under MRE 803(6) as a record of a regularly conducted business activity. We agree.

In *McDaniel, supra* at 413-414, the Supreme Court explained that, while MRE 803(6) allows the admission of business records because of their inherent trustworthiness, police reports prepared in anticipation of litigation, or in a setting that is adversarial to the defendant, may not be admitted under either MRE 803(6) or (8). The trustworthiness of police reports is undermined when they are prepared in anticipation of litigation. *McDaniel, supra* at 414.

Analogizing to *McDaniel*, we conclude that the dispatch recordings were admissible under MRE 803(6) because it does not appear they were prepared in anticipation of litigation. Further, the recordings were made as the police pursuit was happening, thereby enhancing their trustworthiness. The trial court did not abuse its discretion in admitting the recordings under MRE 803(6).

Furthermore, even if it was error to admit the recordings, reversal is not required. "In cases involving preserved, nonconstitutional error, the defendant must demonstrate," after review of the entire case, "that it 'is more probable than not that the error was outcome determinative.'" *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003), quoting *People v Lukity*, 460 Mich 484, 495-496 (1999). Here, the recordings of the pursuit of defendant were generally cumulative of the investigating officer's own testimony. Defendant has not identified any information from the tape recordings that was not otherwise established by the officer's own testimony in court. Accordingly, even if the trial court erred in admitting the recordings, reversal is not warranted. See *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003) ("An erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony.")

Defendant also argues that the prosecutor committed misconduct when she remarked as follows during her rebuttal argument:

> Thank you, your Honor. In Las Vegas, they have these really amazing magic shows where things like elephants seem to disappear, where large cars and even buildings are suddenly gone. Now being reasonable people and having common sense, we all know that they don't actually disappear. We stopped believing in magic probably a long time ago to a certain degree and most of us have probably seen those shows where they actually show you the tricks of what they now call illusionism, not magic. Being a defense attorney is a lot like being an illusionist.

Defense counsel immediately objected to these remarks and the trial court sustained the objection while responding, "I think both attorneys are given an opportunity to make an argument as to what they believe the testimony and evidence shows, so you may proceed."

Because defendant preserved this issue with an objection below, we review the matter de novo to determine whether defendant was denied a fair and impartial trial. *People v Akins,* 259 Mich App 545, 562; 675 NW2d 863 (2003). Claims of prosecutorial misconduct are decided case by case, and the prosecutor's remarks must be reviewed in context. *Id*.

"A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson,* 245 Mich App 572, 592; 629 NW2d 411 (2001). In the case at bar, the prosecutor's argument improperly accused defense counsel of trying to mislead the jury by

comparing his role to that of an illusionist. However, the trial court sustained defendant's objection to the remarks, whereupon the prosecutor redirected her remarks to the evidence presented at trial. Viewed in this context, the prosecutor's remarks were not so egregious that defendant was denied his right to a fair and impartial trial. The comments were not so prejudicial that the jury could not set them aside when deliberating.

Defendant's final argument is that he was denied his right to be present at his arraignment on the information in the circuit court. Because defendant did not raise this issue below, appellate relief is precluded absent a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Although the record of defendant's arraignment does not affirmatively establish his presence at that hearing, it also does not indicate that he was not present. Defendant's presence or absence simply is not a matter of record. Consequently, defendant has not met his burden of establishing a plain error.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter